

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

ORIGINAL 74-1688

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To be argued by
IRVING J. ALTER

In The
United States Court of Appeals
For The Second Circuit

MAX ROBB as Trustee of the Estate of BOTANY
INDUSTRIES, INC., Bankrupt,

Plaintiff-Appellee.

vs.

NEW YORK JOINT BOARD, AMALGAMATED
CLOTHING WORKERS OF AMERICA,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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BRIEF FOR DEFENDANT-APPELLANT

Issues Presented

1. Whether a Federal District Court, in reviewing the award of a labor Arbitrator who affirmed the validity of a supplement to a collective bargaining agreement may hold the supplement to be void and unenforceable on the basis of the Court's own interpretations of the collective bargaining agreement and its supplement, and on the basis of the Court's own findings of fact -- all in direct conflict with the contractual interpretation and findings of fact of the Arbitrator.

2. Whether on review of a labor Arbitrator's award, a Federal District Court has the power (without even holding a hearing) to make de novo findings of facts placed in issue by the parties' affidavits, findings on which the Court based its holding, in conflict with that of the Arbitrator, that said supplement to a collective bargaining agreement is void under Section 8(e) of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §158(e).

3. Whether the owner of a nationally prominent trademark, having granted a license of its trademark to its own wholly owned subsidiary for use in the manufacture of so-called Junior Clothing, is by reason of the essential review, inspection and other functions such owner performs with respect to the use of

the trademark on such Junior Clothing, as well as by reason of the overall control and direction such owner exerts over the manufacturing operation of its subsidiary-licensee, a "jobber" or "contractor" actively engaged in the integrated process of manufacturing Junior Clothing within the meaning of the Garment Industry's Exemption to Section 8(e) of the NLRA.

4. Whether a collective bargaining agreement between the parent of a corporation engaged in the manufacture of Junior Clothing and the Union representing its manufacturing subsidiary, under which the parent agrees not to manufacture, directly or indirectly, any Junior Clothing except through an entity having a collective bargaining agreement with the Union, violates Section 8(e) of the NLRA, when such agreement has been, and is recognized by all the parties as having only one function -- to preserve and safeguard the jobs customarily performed by the Union employees of the subsidiary.

Statement of the Case

This is an appeal by the defendant from an order of the United States District Court for the Southern District of New York (Edelstein, Chief Judge) filed on April 12, 1974 (116 a*, et seq.) which granted plaintiff's motion to vacate the labor arbitration award issued on February 23, 1971 by Arbitrator Herman A. Gray, Impartial Chairman of the Men's and Boys' Clothing Industry, and which denied defendant's motion to confirm

* Pages appearing in parentheses followed by the letter "a" are referenced to the Appendix.

and enforce that award. The District Court held that certain provisions of the underlying agreement upon which the award was based were illegal under Section 8(e) of the NLRA, and that in consequence, the arbitration award was void and unenforceable in its entirety*. Defendant has brought this appeal to reverse the order of the District Court in its entirety and to reinstate the award of the Arbitrator.

Preliminary Statement

This proceeding arises out of an agreement dated November 1, 1966 (the "Botany Agreement") between the New York Joint Board, Amalgamated Clothing Workers of America (the "Union") and Botany Industries, Inc. ("Botany"), executed for the purpose of supplementing the collective bargaining agreement between the Union and Levinsohn Bros., Inc., ("Levinsohn"), a subsidiary of Botany. Levinsohn employed approximately 400 Union employees in the production of so-called Junior Clothing under the BOTANY trademark (98a).

This proceeding came before the District Court because of Botany's dissatisfaction with the interpretation given the Botany Agreement by Herman A. Gray, Impartial Chairman of the Men's and Boy's Clothing Industry, in an arbitration proceeding brought by the Union to determine its rights and obligations under the Botany Agreement. The arbitration proceeding was sparked by the Union's concern, in or about the winter of 1970-71. over the possible imminent liquidation or sale of Botany (80a, 100a).

*The District Court's opinion is officially reported under the title, Botany Industries, Inc. v. New York Joint Board, Amalgamated Clothing Workers of America, 375 F. Supp. 485 (S.D.N.Y. 1974).

The arbitration proceedings resulted in an award (the "Award") which, among other things, affirmed the validity of the Botany Agreement, notwithstanding Botany's contention that the agreement it signed five years previously was a "hot cargo" agreement which violated Section 8(e) of the NLRA, (13a, 82a et seq.)

The District Court (Edelstein, C.J.) after reviewing the award, decided (almost three years after the matter was submitted to it) to vacate the award in its entirety. In so doing, the District Court violated several fundamental rules of law, firmly established in the Federal Courts, as to the limitations on court review of arbitration awards. In addition, the District Court's decision ignored and undermined two important national labor policies: (i) the policy underlying the Garment Industry's broad exemption from the prohibition against "hot cargo" contracts contained in Section 8(e) of the NLRA, and (ii) the policy articulated by the Supreme Court in National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967) reh. denied 387 U.S. 926, that Section 8(e) is never to be used to strike down agreements designed to preserve work customarily performed by employees of the Union making such an agreement.

The Facts

A. The Botany Licensing Operation

Botany, as owner of the trademark BOTANY, was once a powerful factor in the mens' and boys' clothing industry. It was

common knowledge that until April of 1972, when Botany filed a petition for arrangement in the United States District Court for the Eastern District of Pennsylvania under Chapter XI of the Bankruptcy Act, men's and boys' clothing which bore the label BOTANY were much more salable to the consumer than clothing which did not bear the BOTANY trademark or a trademark of equivalent national prominence. Indeed, even the bankruptcy proceedings of Botany may not have seriously affected the present value of its trademark.*

Botany not only licensed its trademark for use by independent clothing manufacturers but also entered the clothing manufacturing business itself by acquiring ownership of a number of clothing manufacturers, such as Levinsohn, to which it granted the exclusive license throughout the United States to use its trademark BOTANY in the manufacture and sale of the specific clothing covered by each license. These licenses were granted under agreements between Botany and each licensee, each such license agreement giving Botany the right, inter alia, to make extensive inspection by its own personnel of the work of the licensees to make certain that its trademark was properly affixed; that the quality and design of the products bearing the BOTANY label were consistent with the high standards Botany wished

* See New York Times, July 14, 1974, §3, p. 12.

to keep for any products bearing its trademark; and that the BOTANY - labelled products were sold only to retail outlets of high repute and with high standards of merchandising, and not to bargain or discount stores, supermarkets, or the like. (See Agreement annexed to Affidavit of Carl Schwartz (20a-21a)).

B. Botany's Acquisition of Levinsohn

On or about July 1, 1966 Botany acquired the firm then known as Levinsohn Bros., & Co., Inc. ("Levinsohn") which, for many years prior to that date, had been engaged in the manufacture and sale of boys', students' and junior clothing (herein collectively called "Junior Clothing") within the United States. Prior to its acquisition by Botany, Levinsohn had been an independent licensee of BOTANY Junior Clothing.

The last agreement from Botany under which Levinsohn operated as an independent licensee of the BOTANY trademark contains language which indicates that Botany, although it engaged in no direct manufacturing, but only in manufacturing through subsidiaries, nevertheless described itself as "engaged in the manufacture and sale...of apparel." That license agreement provides in part, as follows:

"WHEREAS (A) Botany has for many years been engaged in the manufacture and sale of yarns, fabrics and wearing apparel advertised and sold under the name and trademark, 'Botany'..." (16 a) (Emphasis Supplied)

Botany also described itself as a manufacturer in the Botany Agreement itself (See p. 12 infra).

The acquisition of Levinsohn by Botany involved the formation of a successor corporation to Levinsohn, bearing the corporate name of Levinsohn, and wholly owned by Botany (8a, 97a). This successor corporation continued, for a period of approximately five years, the business of the old Levinsohn firm, with much the same personnel, and at the same premises in which the old Levinsohn firm had conducted its business, subject of course, to the supervision and control of its parent, Botany (97a). For reasons not apparent from the Record, Botany liquidated the Levinsohn business a few months after the award of the Arbitrator in this matter. (100a)

Prior to this acquisition, Levinsohn, as a member of the New York Clothing Manufacturers Association, Inc., had for many years entered into successive collective bargaining agreements (called Market Agreements) with Defendant-Appellant Union. Each such agreement (the "Levinsohn Collective Bargaining Agreement") contained long-standing job preservation and job security provisions, prohibiting sub-contracting except to entities in contractual relationship with the Union, and also prohibiting runaway shops. (36a et seq.)*

*The three-year Market Agreement between the New York Clothing Manufacturers' Association, Inc. and the Union and its affiliated National Union, the Amalgamated Clothing Workers of America ("ACWA") dated June 1, 1968, constituted the collective bargaining agreement applicable to Levinsohn during the period involved in this lawsuit and contains, among others, the following safeguards for the Levinsohn employees:

(Footnote continued on following page)

When Botany acquired Levinsohn, the Union became concerned that Botany might use its control of Levinsohn to find a way of circumventing the restrictions contained in the Levinsohn Collective Bargaining Agreement -- restrictions critical to the protection of the jobs and standards of employment of the Union's Levinsohn employees. Since the former shareholder-managers of Levinsohn ceased to have a proprietary interest in Levinsohn, the Union believed they would no longer have the same interest in continuing the business and their relationship with the Union as they had prior to the acquisition, and that they might accept measures desired by Botany, although detrimental to the interests of the Union. (Hollander Affidavit 97a)

* (Footnote continued from previous page)

"IV Union Security

* * *

D. A Manufacturer who employs contractors shall employ only contractors who are in contractual relationship with the New York Joint Board of the Amalgamated Clothing Workers of America and shall not cause or permit any work to be performed for him, directly or indirectly, by any person, partnership, corporation or contractor who is not in contractual relationship with the New York Joint Board except by mutual agreement of the Association and the New York Joint Board." (40a)

* * *

"XV. Other Factories

A. During the term of this Agreement the Employer agrees that he shall not, without the consent of the New York Joint Board, remove or cause to be removed his present plant or plants from the city or cities in which such plant or plants are located. (46a)

B. During the term of this Agreement the Employer shall not, without the consent of the New York Joint Board, manufacture garments or cause them to be manufactured in a factory other than his present factory or factories." (47a)

Despite these concerns, after its acquisition of Levinsohn, Botany was not made a party to the collective bargaining agreement covering the Levinsohn manufacturing operation, because the Union obtained the protection it needed in another manner. Botany agreed in a supplementary instrument -- the Botany Agreement (quoted in full infra at pp. 11 to 13) -- in effect to guarantee compliance with the restrictions against subcontracting and run-away shops contained in the Levinsohn Collective Bargaining Agreement. Such an agreement was not only needed to prevent Botany, through control of its subsidiary, Levinsohn, from causing Levinsohn to violate its agreement with the Union, but also because Botany had entered the business of manufacturing Junior Clothing through its subsidiary in a manner which was virtually identical to the method by which a jobber engages in the manufacturing business through its contractors and subcontractors. Agreements such as the Botany Agreement between the Union and the jobbers initiating or ultimately controlling the integrated process of clothing production have long been regarded as essential for protection of union employees and the garment industry from the evils of sweatshop subcontracting which once plagued this industry. Consequently, such agreements were specifically exempted from the ban on "hot cargo" agreements contained in Section 8(e). (See discussion infra pp. 48-53).

After the acquisition, Botany implemented its control of

Levinsohn by placing Mitchell N. Daroff, its Vice-President, on the Board of Levinsohn and making him the President of Levinsohn (98a). Mr. Daroff was one of the most important executives of Botany. Botany also caused the Levinsohn Board to elect as Vice-President of Levinsohn Mr. James Greene, the Executive Assistant to the President and Secretary of Botany, another key officer of Botany (99a).

Botany could, of course, have replaced the entire Board of Levinsohn, but apparently felt that it would have sufficient control over Levinsohn's manufacturing operations by placing two of its key executives in the major executive positions of President and Vice-President of Levinsohn. It is quite obvious that as long as the representatives of Botany sat on the Levinsohn Board and occupied the key executive positions of Levinsohn, Botany would have effective control over every major decision of Levinsohn, and that Levinsohn's older staff would look to the representatives of Botany for approval and direction of their operations.

C. The Execution of the Botany Agreement

The true facts which gave rise to the Botany Agreement executed on November 1, 1966 are completely at variance with the interpretation given by Botany and the District Court in this proceeding. According to the uncontradicted affidavit of Mr. Hollander, Manager of the Union, shortly after the acquisition

of Levinsohn by Botany, in or about July of 1966, Michael Daroff, the Chairman of the Board of Botany, personally advised Mr. Hollander of the acquisition of Levinsohn by Botany and discussed with Mr. Hollander the likely impact of the acquisition upon the job tenure of approximately 400 clothing workers at Levinsohn who were covered by the existing Levinsohn Collective Bargaining Agreement. During this conference Mr. Hollander asked Mr. Daroff for some assurances that Botany would not, through any reorganization or other corporate maneuver, endanger the job position of said 400 workers. Mr. Daroff understood Mr. Hollander and agreed to grant the Union such assurances (98 a), apparently convinced that the assurances were required in order to give Botany's new subsidiary the benefit of continued satisfactory labor relations with its Union employees. As Mr. Hollander has sworn in his Affidavit, these assurances were ultimately embodied in the Botany Agreement.

"I told him (Mr. Daroff) of my concern that we wanted assurances from Botany that the 400 people working with Levinsohn would not lose their jobs. He agreed to this. The conferences resulted in the November 1, 1966 Agreement between Botany and the Union" (98 a).

The Botany Agreement, which is quoted below in full, should be read in its entirety to determine its true meaning in the context of this dispute:

"WHEREAS, the Union is and has been in contractual relations with Levinsohn Bros. & Co., a manufacturer

of boys', students' and junior clothing, obligating it, among other things, to manufacture or cause to be manufactured, the said clothing in its own production facility and only in production facilities under contract with the Union; and

WHEREAS, the boys', students' and junior clothing manufactured or caused to be manufactured by the said Levinsohn Bros. & Co. has been manufactured pursuant to an exclusive license agreement with Botany, by skilled union craftsmen operating under a collective bargaining agreement with the Union in a manufacturing facility owned and/or operated by Levinsohn Bros. & Co.; and

WHEREAS, Botany has purchased Levinsohn Bros. & Co.; and

WHEREAS, Botany desires to continue to have such boys', students' and junior clothing manufactured by it and on its behalf by skilled union craftsmen operating under a collective bargaining agreement with the Union and in a manufacturing facility owned or controlled by it.

NOW, THEREFORE, in consideration of the promises herein contained, the parties hereto agree as follows:

1. Botany agrees to continue to manufacture boys', students' and junior clothing in a manufacturing facility operated by Botany or on its behalf, by its own subsidiary, or by a company owned or controlled by it pursuant to the terms of a collective bargaining agreement with the Union.

2. Botany further agrees that any and all boys' students' and junior clothing manufactured for and on its behalf shall only be manufactured in production facilities which are in contractual relations with the Union, and that Botany will not cause, directly or indirectly, any of such boys', students' and junior clothing to be manufactured in any other production facility which is not in contractual relations with the Union without first obtaining the prior written consent of the Union.

3. Any controversy or claim arising out of or relating, directly or indirectly, to the provisions of this Agreement, or the interpretation and performance

thereof, shall be settled by arbitration. The Arbitrator named in the agreement between the Union and the New York Clothing Manufacturers' Association, Inc. its successor or assign, is hereby designated as the Arbitrator under this Agreement. Such arbitration shall be held in the City of New York, in accordance with the laws of the State of New York. The parties hereto consent that any papers, notices or processes, including subpoenae, necessary or appropriate to initiate or conduct an arbitration hereunder, or to enforce or to confirm an award, may be served by certified mail directed to the last known address of the parties. The parties further consent that the Arbitrator is empowered to issue an award providing for mandatory direction, prohibition, order and/or money damages, and that the decision, order, direction or award of the Arbitrator shall be final, conclusive, binding and enforceable in a court of competent jurisdiction.

4. This Agreement shall be binding upon the parties hereto, their successor and assigns.

5. This Agreement shall be effective upon the date hereof, and shall continue in full force until June 1, 1981, or the term of the agreement between the Clothing Manufacturers' Association, Inc. its successor or assign and the Union, in effect as of June 1, 1981, whichever is later." (Emphasis supplied) (33a-35a)

D. The Purpose and Effect of the Botany Agreement

The "Whereas" clauses indicate that the purpose of the Agreement is to protect the skilled Union craftsmen employed by Levinsohn. No other purpose is stated. The substantive provisions of the Agreement reflect the desire of its draftsmen to make certain that the numerous corporate reorganizations which Botany was engaging in at the time would not result in a loss of the jobs of the Union's Levinsohn workers.

Since Paragraph 6(a) of the Levinsohn License Agreement (23 a) specifically gave Levinsohn the exclusive right to manufacture Junior Clothing under the BOTANY label throughout the United States, Paragraphs 1 and 2 of the Botany Agreement, restricting Botany to the manufacture of Junior Clothing in production facilities which are in contractual relations with the Union, can only mean that the entities covered by these paragraphs are Levinsohn, which was already in contractual relations with the Union, or a successor licensee to Levinsohn, also required to be in a contractual relationship with the Union. In order to prevent Botany from circumventing the Levinsohn Collective Bargaining Agreement's provisions against subcontracting and runaway shops, Paragraphs 1 and 2 were inserted in the Botany Agreement so that if Botany did replace Levinsohn with another entity, the Union would have the power to require such successor licensee to provide jobs for the former Union workers of Levinsohn as a condition of entering into a collective bargaining agreement with such successor licensee; for Paragraph 2 of the Botany Agreement permitted only an entity in contractual relationship with the Union to be established by Botany for the manufacture of Junior Clothing. As a further assurance of job security for Levinsohn's Union workers, the Botany Agreement also provided it would remain in effect until June 1, 1981.

Were it not for the acquisition of Levinsohn by Botany, the anti-subcontracting and runaway shop provisions in the Levinsohn Collective Bargaining Agreement would have been sufficient to safeguard the jobs of the Levinsohn Union workers. It was only when Botany became the true master of the Botany Junior Clothing Manufacturing operation that the need to secure a protective agreement from Botany arose.

E. The Arbitration Proceedings

Although Botany had, in the License Agreement and the Botany Agreement, agreed in effect to have the Levinsohn Union employees continue to manufacture Junior Clothes under the Botany label, at or about the beginning of the Winter of 1970-71 the Union began to hear rumors that Botany would liquidate Levinsohn in the near future (100 a). Since one of the prime purposes of the Botany Agreement had been to retain the jobs of Union members employed by Levinsohn, and a liquidation of Levinsohn by Botany would probably destroy such jobs, the Union's attorneys, on the instructions of Mr. Hollander, commenced an arbitration proceeding for the purpose of defining the rights and obligations of the parties under the Botany Agreement, and for the purpose of enjoining Botany from violating its obligations under this Agreement.

The arbitration was held before Herman A. Gray, who had been designated as Arbitrator in Levinsohn's

Collective Bargaining Agreement as well as in the Botany Agreement.

Despite the fact that five years had passed since Botany's Chairman of the Board had signed the Botany Agreement, in the arbitration proceeding Botany attacked the Botany Agreement as a "hot cargo" agreement violative of Section 8(e). Botany also contended that the length of the term of the Botany Agreement rendered it invalid; and that the Botany Agreement was unconscionable and even violated the antitrust laws. Although he declined to rule on Botany's contention that the length of the Botany Agreement rendered it invalid under the "labor act"*, the Arbitrator did reject all of Botany's other legal challenges and held the Botany Agreement to be legal and enforceable.

F. The Award of Arbitrator Gray

The award of Arbitrator Gray interprets the Botany Agreement to require Botany not to engage in the manufacture of Junior Clothing directly or indirectly unless its manufacturing facility operates under a collective bargaining agreement with the Union, and that only Junior Clothing so manufactured may carry the trademark BOTANY. The Arbitrator also held that in order to assure compliance with the agreement Botany was prohibited from selling or licensing or agreeing to sell or license the trademark BOTANY in connection with any other manufacturing of Junior Clothing. In addition, the Arbitrator held that until June 1, 1981 Botany was required "to continue to manufacture... Junior Clothing in a manufacturing facility owned or controlled

* The District Court erroneously states in footnote 3 at 375 F. Supp. 488 that the Arbitrator declined to adjudicate the Section 8(e) issue. The 8(e) issue was raised in Botany's post-hearing memorandum submitted to the Arbitrator before his award, and the Arbitrator nevertheless ruled that the Botany Agreement was valid, declining only to rule on the contention that the obligation of Botany to continue manufacturing "for the life of the Agreement would be a violation of the 'Labor Act'". (13a,88a). Indeed Botany conceded this fact in the Schwarz Affidavit (13 a).

by it, or on its behalf by its own subsidiary or by a company owned or controlled by it, which facility is operated under collective agreement with the Joint Board [the Union]." (91a)

It is evident from the tenor and wording of the Arbitrator's decision and award, that the Arbitrator interpreted the two agreements before him and found sufficient facts to justify considering Botany, which determined all ultimate decisions of the manufacturer, to be a manufacturer or "jobber" in the integrated process of producing BOTANY Junior Clothing, for the purpose of determining the applicability of the Garment Industry's Exemption from Section 8(e) of the NLRA. It is also evident that for this purpose he may also have considered Botany the alter ego of Levinsohn and may have interpreted the Botany Agreement so as to require Botany to adhere to the restrictions therein for the purpose of preserving for the Levinsohn workers the work customarily done by them, and that the Botany Agreement was, in consequence, exempt from Section 8(e) under the National Woodwork doctrine (see pp. 56ff infra) and the Garment Industry's Exemption.

The Decision and Opinion Below

The Arbitrator's award was handed down on February 13, 1971. On May 21, 1971, at or about the time Botany caused Levinsohn to be liquidated, Botany moved in the United States District Court for the Southern District of New York for an order vacating the Arbitrator's award. The Union then moved to confirm and enforce

the Award. Affidavits and briefs were submitted to the District Court by the parties in support of their respective motions.

Without holding any hearing, even with respect to substantial facts placed at issue for the first time before the District Court, District Court Chief Judge Edelstein, in a decision handed down on April 12, 1974, nearly three years after the matter had been submitted to him for decision, vacated the award of Arbitrator Gray in its entirety.

The District Court recited as the facts only the mere acquisition of Levinsohn by Botany, part of the text of the Botany Agreement, and the Arbitrator's award interpreting the Botany Agreement. After rejecting the Union's contention that the prevailing rules governing arbitration proceedings rendered the Arbitrator's award nonreviewable by the District Court, that Court proceeded to determine whether the Botany Agreement fit within the Garment Industry's Exemption from Section 8(e).

The Court considered at length whether Botany and Levinsohn could be considered a "Single Employer" within the meaning of the National Labor Relations Board ("NLRB") "Single Employer" doctrine. The Court did so in order to determine whether Botany could be deemed an active participant -- a "jobber" or "contractor" -- to the same extent Levinsohn was a "jobber" or "contractor", in the integrated process of producing BOTANY Junior Clothing. The District Court apparently was convinced that the NLRB "Single Employer" doctrine afforded the only

possibility of justifying the application of the Garment Industry Exemption to the Botany Agreement and did not appear to consider at all the purpose and practical operation of the Agreement in determining the applicability of such exemption. The District Court ultimately concluded that the Botany Agreement did not qualify for the exemption by finding that Botany was not the "manufacturer" of the Botany Junior Clothing and had not satisfied the extensive control requirements of the "Single Employer" doctrine (a doctrine which was designed primarily to determine whether two corporate entities are so fused by common operational day-to-day control that they may both be subjected to sanctions imposed by the NLRB for unfair labor practices or may be considered a single entity for jurisdictional purposes).

After finding that Botany did not meet the "Single Employer" test, the District Court referred only to a small portion of the legislative history of the Exemption*, consisting of an illustration of the method by which the exemption would work, appended to the Congressional Record by Senator Goldwater, one of the Conference who drafted the Exemption. And, although not compelled to do so by the actual language of Senator Goldwater, the District Court drew from his remarks an ironclad definition of the conditions under which this Exemption is to be applied. The Court then held that Botany, not being a Single Employer

* Section 8(e) was not included in the NLRA until 1959, when it was added to the NLRA by Section 704(b) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959). The Text of the Exemption appears at p. 54, infra.

with Levinsohn (which the court apparently regarded as the only manufacturer, jobber or contractor engaged in the production of BOTANY Junior Clothing) did not qualify for the exemption, rendering its agreement with the Union void and unenforceable -- the very result Botany, a self-described "manufacturer" of apparel bearing the Botany mark (see pp. 6, 12 supra) had sought in bringing its action to vacate the arbitration award.

The District Court stated:

"Congress carved out, for the garment industry, certain exceptions from the general prohibitory language of section 8(e). But, it is quite clear that Congress intended the exemption to be an extremely limited one, restricted to employers and labor organizations who actively participate in the integrated process. The conference Report of the House Managers stated that the statutory language 'grant[ed] a limited exemption in three specific situations in the apparel and clothing industry....' These situations, according to Sen. Barry Goldwater, one of the Joint Conferees, arise only

"where the relationship between such employer and other employers in said industry - that is, between primary and secondary employers - is that of a jobber, manufacturer, contractor, or subcontractor and where first, the subcontractor performs his work for and on the premises of the contractor, jobber, of manufacturer; or, second, the subcontractor performs his work for and on goods or materials supplied by such contractor, jobber, of manufacturer; or, third, one employer is engaged in an integrated process of production with the other employer." (Emphasis supplied). 375 F. Supp. 485 at 495.

These interpretations of Senator Goldwater are contained only in an extension of his remarks consisting of a memorandum under which he individually attempts to analyze the provisions

of Section 8(e), the Senator's memorandum does not therefore represent a document issued under the authority of the Joint Conferencees. II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter referred to as II Leg. Hist.] 1843, 1857.

The District Court also rejected the contention of the Union that the Botany Agreement, having as its primary purpose the preservation of Union jobs, was exempt under the decision of National Woodwork Mfrs. Ass'n v. N.L.R.B., supra. The District Court states, as its reason for rejection of this other contention of the Union, "that the language of the Agreement... clearly indicates that the Agreement was 'tactically calculated to satisfy union objectives elsewhere' and that the 'true intent' of the Agreement was not to protect the Levinsohn employees from losing work they had traditionally done. The Court stated that the true intent underlying the Agreement was instead "to preserve work to the Union as a whole." 375 F. Supp. 498-9.

Summary of Argument

As indicated by its truncated discussion of the Congressional history of the Garment Industry's Exemption, the District Court apparently overlooked the extensive history of Congress' strong desire to use the Garment Industry's Exemption (see pp 48-53 infra) as a method of preserving the hard-won vigor and profitability of the American Garment Industry, a status that had come about through use,

among other things, of agreements which would be prohibited by the new Section 8(e). Instead of attempting to read the Garment Industry's Exemption in the light of the entire Congressional history, the District Court narrowly interpreted one illustration of its operation given by Senator Goldwater.

The District Court apparently did not comprehend that the rationale, purpose, operation and effect of the Botany Agreement actually brought the Botany Agreement even within the criteria for exemption recognized by the District Court; for the purpose, operation and effect of the Botany Agreement were the same as if Botany had itself "actively participated" in the integrated process of producing BOTANY Junior Clothing, and in substance and even in form, Botany was a manufacturer and was a "jobber" or "contractor" within the meaning of the Garment Industry's Exemption (see Point III A, infra at p. 42). Nor did that court understand that if Botany replaced its subsidiary Levinsohn as the exclusive U.S.A. licensee for BOTANY Junior Clothing, the Botany Agreement required any successor manufacturer of Botany Junior Clothing to have a Collective Bargaining Agreement with the Union. Since the Union would never enter into such a Collective Bargaining Agreement without requiring Botany's successor licensee to employ the former Union employees of Levinsohn, Botany could

not legally ever produce junior clothing except through a firm which would employ the Levinsohn Union employees (who presumably would be discharged by Levinsohn when Levinsohn's license from Botany was terminated.)

Thus, the District Court's conclusion that National Woodwork is inapplicable because the Botany Agreement was "tactically calculated to satisfy union objectives elsewhere" defies both the language and necessary operation of the Botany Agreement and the Levinsohn Collective Bargaining Agreement, as well as the uncontradicted affidavit of Mr. Hollander as to the essential purpose of the Botany Agreement.

Further errors of the District Court relating to the process by which it found the facts on which its decision is based are discussed in Point II of the Argument.

While we have little doubt that the facts presently in the Record, as to which there is no dispute, entitle the Botany Agreement to the benefit of exemption from Section 8(e), this Court, we respectfully submit, should never have to consider such facts or any of the issues of law presented by the District Court opinion other than the power of that Court, under prevailing arbitration rules, to review and

reverse the award of Arbitrator Gray. As demonstrated in Point I of the Argument infra, the award of the Arbitrator could not, as a matter of law, be reviewed by the District Court in the manner in which it chose to consider the award.

The District Court improperly reached the ultimate conclusion that the Botany Agreement was invalid, on the basis of its own interpretations of the provisions of the Botany Agreement and the Levinsohn Collective Bargaining Agreement, including among others, its own interpretation of the purpose of the Botany Agreement and the relationship of Botany to the parties to the Levinsohn Collective Bargaining Agreement. The Court below also committed the serious error of relying on its own independent findings of the facts.

Without such independent fact-finding and interpretation of the Agreements, the District Court would not have had any logical basis for invalidating the Botany Agreement under Section 8(e); for the relevant provisions of the Botany Agreement and the relevant facts had necessarily been interpreted and found by the Arbitrator to qualify the Botany Agreement for exemption from Section 8(e) under the Garment Industry's Exemption or the National Woodwork

doctrine. Such independent interpretations of collective bargaining agreements and independent fact-finding by the District Court constitute clear violations of the existing law of arbitration, as interpreted and applied by the United States Supreme Court, and this Court.

In short, the Botany Agreement was, under Arbitrator Gray's interpretation of this Agreement and his necessary interpretation of the facts relating thereto, exempt from the ban on "hot cargo" agreements contained in Section 8(e). The Arbitrator's contractual interpretations and findings of fact not being reviewable as a matter of law, the District Court did not have the power to reverse the Award on the basis of its independent interpretation of the Botany Agreement and the facts relating thereto.

I

THE DISTRICT COURT COMMITTED RE-
VERSIBLE ERROR IN SUBSTITUTING
ITS INTERPRETATION OF THE LAN-
GUAGE AND INTENT OF THE BOTANY
AGREEMENT AND OF THE LEVINSOHN
COLLECTIVE BARGAINING AGREEMENT
FOR THE ARBITRATOR'S INTER-
PRETATION OF SUCH AGREEMENTS

Before the District Court could have found that the Botany Agreement (which, as explained above, was intended to supplement and guarantee Levinsohn's adherence to certain job preservation provisions in the Levinsohn Collective Bargaining Agreement) was

not entitled to exemption from Section 8(e) of the LMRA, either under the Garment Industry's Exemption or the National Woodwork decision, that Court necessarily had to interpret, among other aspects of the two Agreements, the purpose of the Botany Agreement and the role intended for Botany in the operation of the Levinsohn Collective Bargaining Agreement. After a limited review of the Congressional history, and a review of the language of the two agreements, the Arbitrator's award, the facts set forth in the affidavits of the parties, and the text of Section 8(e) itself, the District Court (i) interpreted the two agreements as placing Botany outside the integrated process by which its subsidiary, Levinsohn, produced BOTANY Junior Clothing and (ii) interpreted the purpose and text of the Botany Agreement to be to protect employees other than the Levinsohn Union employees.

These interpretations of the District Court are at complete variance with the implicit view of the Arbitrator that (i) Botany, by virtue of the functions it performed under the Levinsohn License Agreement and its control of its subsidiary's operation, was a self-described manufacturer and thus a "jobber" or "contractor" within the meaning of the Garment Industry's exemption to Section 8(e); and that (ii) the Botany Agreement was designed solely to protect the Levinsohn workers, not workers "elsewhere", by preventing Botany from circumventing the anti-subcontracting and runaway shop provisions of the Levinsohn Collective Bargaining Agreement inserted therein for the benefit of the Levinsohn

workers alone. Without the District Court's peculiar interpretations of the two agreements, the District Court would have had no logical basis for its conclusion that the Botany Agreement was not entitled to exemption from Section 8(e) under either the Garment Industry's Exemption, or the National Work-work decision.*

This is not a case of an agreement which is invalid on its face. On the contrary, this proceeding involves an agreement, the validity of which depends entirely on the interpretation given its purpose, the manner in which it will operate, and its relationship to another agreement (the Levinsohn Collective Bargaining Agreement). It is only where an agreement is invalid on its face that the Arbitrator's determination of the validity of the Agreement may be reviewed by the Courts.

What the District Court has done is to indirectly exert a power denied to it by prevailing arbitration rules. It has overruled the Arbitrator's interpretation of the two agreements involved in the award in order to reach an ultim-

* See footnote at p. 16, supra

mate determination, contrary to that of the Arbitrator, that the Botany Agreement was invalid. This it cannot do -- under the controlling doctrine of United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

In Enterprise, the Supreme Court could not have stated the applicable rule more clearly. It held:

"[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." id. at 599.

As the Third Circuit said in Ludwig Honold Manufacturing Company v. Fletcher, 405 F.2d 1123, 1126 (3rd Cir. 1969):

"Enterprise enunciated a basic philosophy that was to apply to all labor arbitration cases. It elevated the arbitrator to an exalted status -- emphasizing that there would be no interference with his award simply because a reviewing court differed with him in its interpretation of provisions of the contract."

It is surprising indeed that in the instant case Judge Edelstein sought to distinguish Enterprise, for in an earlier case involving substantially similar facts and legal issues, Garment Workers' Locals 234 and 243 v. Beauty Bilt Lingerie, Inc., 43 CCH Lab. Cas. ¶17, 126 (S.D.N.Y. 1961), Judge Edelstein relied on Enterprise in confirming an arbitration Award despite the employer's contentions (i) that the collective bargaining agreement upon which the Award was

based was invalid because it violated Section 8(e) of the LMRDA and (ii) that the Award required an act in violation of Section 8(e). In the Garment Workers case, Judge Edelstein stated unequivocally that the Steelworkers Trilogy* requires "the judiciary... to play a limited role in the arbitral process and that the judicial function be narrowly circumscribed" 43 Lab. Cas. 25, 124, and quoted with approval the following language from the case of Textile Workers Union of America v. Cone Mills Corp., 188 F. Supp. 728, 736 (M.D. N.C. 1960), aff'd 290 F.2d 921 (4 Cir. 1961)

"These cases further teach that courts should refuse to review the merits of an arbitration award, and that ambiguity in the opinion of the arbitrator is no reason for refusing to enforce the award. Additionally it is held in the Enterprise case that courts have no business overruling the arbitrator because they place a different construction on the contract from that of the arbitrator" (Emphasis provided).

In Garment Workers, where defendant attacked the validity of the collective bargaining agreement under Section 8(e), Judge Edelstein noted that the arbitrator had already determined the existence of the jobber-contractor relationship in the garment industry, and that such determination automatically validated the agreement under the Garment Industry's Exemption. So, in the instant case, it is implicit in the arbitrator's award that he had found that the relationship between Botany and the Union, and the purpose of the agreement, were such that the Botany Agreement was valid and exempt from the "hot cargo" prohibitions of §8(e).

* Three cases, involving the function of courts vis-a-vis arbitrators, decided by the Supreme Court in 1960 are commonly referred to as the Steelworkers Trilogy: United Steelworkers of America v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf, 363 U.S. 574 (1960); United Steelworkers v. Enterprise, supra.

Although cognizant of the Enterprise decision, the District Court below argued that it was not attempting to construe or interpret a collective bargaining agreement but was merely trying to determine whether the agreement and award were "enforceable".

This attempt to distinguish the Enterprise case is but a self-deceptive semantic exercise. The District Court cannot use such reasoning to avoid the blunt fact that in order to invalidate the Botany Agreement, the District Court found it necessary to violate the Enterprise rule by overruling the Arbitrator's plausible interpretations of the Levinsohn Collective Bargaining Agreement and the Botany Agreement.

Since the Supreme Court has prohibited the District Court from overruling the interpretations of the Arbitrator, the District Court cannot even lawfully reach questions of the validity or enforceability of agreements which are directly dependent upon interpretations of those Agreements made by the Arbitrator. The Enterprise rule would have little meaning if it could be evaded merely by a court interpretation, rendering invalid an agreement which an Arbitrator had previously determined to be valid, on the basis of his own plausible, but different, interpretation of its provisions.

It is evident from a reading of the award of the Arbitrator, for many years, the Impartial Chairman of the Mens' and Boys' Clothing

Industry, that, being thoroughly familiar with the Garment Industry, he understood and interpreted the purpose of the Botany Agreement to be to supplement the Levinsohn Collective Bargaining Agreement by having the parent of Levinsohn, Botany, guarantee the anti-subcontracting and runaway shop prohibitions of the Levinsohn Collective Bargaining Agreement, all for the protection of the Levinsohn union employees. The Arbitrator also had every right to consider Botany, because it had acquired complete ownership and control of Levinsohn, to be the true manufacturer and jobber in the integrated process of manufacturing BOTANY Junior Clothing and therefore clearly within the Garment Industry's Exemption. Finally, the Arbitrator could well have viewed the Botany Agreement as having its prime purpose the preservation for Union employees at Levinsohn of their customary work, thus making the Agreement exempt from Section 8(e) under the work preservation doctrine of the National Woodwork decision.

Relying on his extensive knowledge of the garment industry, the Arbitrator obviously gave the Botany Agreement a practical construction, and, as a result, concluded that all the participants in the BOTANY Junior Clothing production process, including Botany, were entitled to exemption from Section 8(e). The ultra-fine distinctions drawn by the District

Court as to who was the "employer" and "active participant" in the integrated process in its improper de novo interpretation of the Agreements, having no bearing on the real practical purpose of the Botany Agreement and Botany's true role in the production process, would have been of no significance to the Arbitrator, and could not have led him to deny the Botany Agreement and the exemption from Section 8(e) to which he felt the Botany Agreement was entitled.

The "severe limitations" by which courts reviewing arbitration proceedings are bound have time and time again been articulated by this Court and others. Thus, this Court stated in Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corporation, 274 F. 2d 805 (2d Cir. 1960), cert. den. 363 U.S. 843 (1960):

"Were we empowered to view the matter de novo, we would find much to persuade in the arguments advanced by the dissenting arbitrator. But as respondent recognizes, the court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e. avoidance of litigation, would be frustrated. See Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681 (1950). The statutory provisions, 9 U.S.C. §§10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous findings of fact or of misinterpretation of law.... But cf. Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 note 4, 76 S. Ct. 273, 276, 100 L. Ed. 199: 'Whether the arbitrators misconstrued a contract is not open to judicial review.'..." 274 F.2d at 808 (Emphasis Supplied)

The Ninth Circuit soon followed suit by stating:

"As was noted in Amicizia Societa, supra,

[§08], the statutory grounds for vacating or modifying the award of arbitrators are stated in Secs. 10 and 11 of Title 9 U.S.C. and neither section authorizes the setting aside of an award 'on grounds of erroneous finding of fact or misinterpretation of law.' It is inconceivable that in enacting these sections Congress was unaware of the rule of Burchell v. Marsh, supra, to the effect that a court will not set aside a decision of the arbitrators for error either in law or fact. Had Congress contemplated that any different rule should now become operative, or that a mere error of law should be a basis for setting aside an award, it would have had no difficulty in drafting a separate subdivision of sections 10 or 11 which would say that." San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Limited, 293 F.2d, 796, 801-802 (9th Cir. 1961) (Emphasis Supplied).

Note also that in Amicizia, the District Court had stated that an arbitration award should not be disturbed unless there was "a perverse misconstruction" of the law, 184 F. Supp. 116, 117 (S.D.N.Y. 1959).

Although the District Court used most of its written opinion to discuss the validity of Paragraphs 1 and 2 of the Botany Agreement, its decision also overruled the Arbitrator's interpretation of the other provisions of the Botany Agreement, namely, the Arbitrator's construction of the Agreement prohibiting use of the trademark BOTANY on Junior Clothing by entities not having a collective bargaining agreement with the Union, and the Arbitrator's interpretation of the term of the Agreement to mean that Botany must remain in the Junior Clothing business until 1981. Under the doctrine of the Enterprise case, these inter-

interpretations of the Arbitrator were erroneously overruled by the District Court's decision vacating the Arbitrator's award in its entirety.

All of the interpretations of the two Agreements by the Arbitrator and his determinations based thereon were clearly within the scope of the arbitration clause of the Botany Agreement. That clause states, broadly, that:

"Any controversy or claim, arising out of or relating, directly or indirectly, to the provisions of this Agreement or the interpretation and performance thereof, shall be settled by arbitration." (Emphasis Supplied) (34a)

Similarly, to the extent that the Arbitrator's interpretations and rulings were based on the Levinsohn Collective Bargaining Agreement, there can be no doubt that such interpretations and rulings were within the scope of the broad arbitration clause of that agreement. (48 a)

A court's function in confirming or vacating an arbitration award is "severely limited" because if it were otherwise, the reasons the parties to a Collective Bargaining Agreement resort to arbitration rather than the courts -- to expedite the resolution of labor disputes and to avoid industrial disruption and to minimize litigation -- would be frustrated.

Amicizia Societa Navegacione v. Chilean Nitrate & Iodine Sales Corp., supra

Newark Stereotypers' U. No. 18 v. Newark Morning Ledger Co.,
397 F. 2d 594, 598 (3rd Cir. 1968) cert. denied 393 U.S. 954 (1968).

Indeed, it has been noted that while the standards for reviewing commercial arbitration awards call for the exercise of judicial restraint, "such a philosophy of restricted review compels even less judicial interference in matters arising from labor arbitration" (Emphasis supplied), Ludwig Honold Manufacturing Company v. Fletcher, 405 F. 2d 1123, 1128 (3rd Cir. 1969).

Even in non-labor arbitration, the finality of arbitration awards is firmly established in the law. In Saxis Steamship Company v. Multifacs International Traders, Inc., 375 F. 2d 577, 582 (2d Cir. 1967), this Court held that "'mere error in the law or failure on the part of the arbitrators to understand or apply the law'" quoting Wilko v. Swan, 346 U.S. 436, 440 will not justify judicial intervention. This rule has been firmly established in this Circuit and elsewhere.

Office of Supply, Government of the Republic of Korea v. N.Y. Navigation Co., 469 F. 2d 377 (2d Cir. 1972);

South East Atlantic Shipping Limited v. Garnac Grain Co., 356 F. 2d 189 (2d Cir. 1966);

Orion Shipping and Trading Co. v. Eastern States Petroleum Corp. 312 F.2d 299 (2d Cir. 1963); cert. denied, 373 U.S. 949 (1963).

San Martine Compania de Navegacion v. Saguenay Terminals Limited, supra.

Bell Aerospace Co. v. Local 516, U.A.W., 356 F. Supp. 354, 355

The correct approach to a matter such as this, directly at odds with the erroneous approach of the court below, was aptly set forth by the Third Circuit in Ludwig Honold Manufacturing Company v. Fletcher, supra, as follows:

"The arbitrator's award in the case at bar can indeed be drawn from what the Supreme Court in Enterprise described as the labor arbitrator's source of law; the express provisions of the contract and the tenets of industrial common law. It can be justified on the grounds that he construed the agreement as a whole, that he gave it a construction rendering performance of the contract possible rather than one which rendered its performance impossible or meaningless, and that his interpretation gave a reasonable and effective meaning to the manifestations of intention of the parties considered against the backdrop of practices of industry and the shop.

We cannot say that his award flies in the face of any rational interpretation of the collective bargaining agreement, viewed in the light of the criteria we have discussed heretofore in detail. Accordingly, we hold that judicial interference with the arbitrator's award was not proper." 405 F.2d at 1132-1133. (Emphasis Supplied)

More concisely, but in the same vein, this Court has indicated the appropriate scope of review of labor arbitration awards:

"Under our limited scope of review of arbitration awards we are bound by the arbitrators' factual findings and by their interpretation of the contract and of contract law." South East Atlantic Shipping Ltd. v. Garnac Grain Company." 356 F. 2d 189, 191-192 (2d Cir. 1966). (Emphasis supplied)

The District Court cannot justify its disregard of the Arbitrator's findings of fact and interpretations of the Agreements by the failure of the Arbitrator to set forth the specific facts and reasons underlying his award. It is well established in this Circuit that the Arbitrator is not required to do so.

Sobel v. Hertz, Warner and Co., 469 F. 2d 1211 (2d Cir. 1972)

In Sobel, a case arising out of a claim of alleged violations of the Securities Law, the party disappointed by the results of the arbitration proceeding sought to have the award vacated on the ground that the arbitrator had disregarded a crucial question of law. Since it was impossible to determine from the award itself exactly what findings of fact and law the arbitrator had made, the District Court decided to remand the controversy to the arbitrator. On an appeal from the remand of the case to the District Court, this Court took great pains to consider the countervailing policy arguments and concluded that it was less important for arbitrators to explain their reasoning than to promote the public interest in assuring expedition and finality of the arbitration process. The Court there stated that:

"Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbi-

trated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement...Given that acceptance, the primary consideration for the courts must be that the system operate expeditiously as well as fairly."

* * *

"[T]here is also a public interest... in the proper functioning of the arbitral process,... [F]orcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process now achieves." 469 F.2d at 1214-1215.

In the instant case, one hardly need examine the record with a magnifying glass to find plausible grounds for Arbitrator Gray's decision. Botany had raised the Section 8(e) issue in the hearing before the arbitrator and in its post-hearing memorandum. The Union had presented its opposing position and had detailed the closely interwoven relationship of Botany and Levinsohn. As indicated above, the Arbitrator must necessarily have considered these points and must therefore have found that Botany and Levinsohn each constituted the alter ego of the other, or that Botany was the true "jobber", in the process of producing BOTANY Junior Clothing. The Arbitrator must also have found that in terms of its purpose and the intent of the parties, the Botany Agreement either fell within the Garment Industry's Exemption to Section 8(e), or within the work-preservation doctrine of the National Woodwork decision, and on one or both of those grounds, granted the Botany Agreement exemption from Section 8(e).

The rule that should have been applied below, and the rule which this Court should apply now, is exactly the same as was stated in Sobel:

"[I]f a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." 469 F. 2d at 1216., citing Granite Worsted Mills, Inc. v. Aaronson, Cowen, Ltd., 25 N. Y. 2d 451, 306 N. Y. S. 2d 934, 255 N.E. 2d 168 (1969).

It is thus evident that the District Court, by its almost cavalier treatment of Arbitrator Gray's decision, has totally disregarded the severe limitations the courts have placed upon themselves in the review of the arbitration proceedings. In so doing, the District Court has violated basic and important principles of arbitration law, as well as firmly established national labor policy policy underlying arbitration law. Its decision therefore should be reversed in its entirety.

II

THE DISTRICT COURT ERRED IN MAKING INDEPENDENT FINDINGS OF FACT ON WHICH IT BASED ITS DECISION

Not only is the District Court's decision grounded on an interpretation of the two agreements which differs from that of the Arbitrator, but the District Court found it necessary to make findings of specific facts on which to base its decision.

For example, in order to find that Botany was not a "Single Employer" with Levinsohn the District Court had to find that Botany did not exercise sufficient day-to-day operational control

over Levinsohn to justify the application of the Single Employer doctrine. The question of degree of Botany's control over Levinsohn was an issue of fact in sharp dispute, as demonstrated by the conflicting affidavits of Botany and the Union submitted to the District Court.

Although it held no evidentiary hearing whatsoever, the District Court had no hesitation in resolving all disputes as to the facts it deemed necessary to support its decision on the various legal issues, whether they were facts necessarily determined by the Arbitrator or new facts raised in the District Court. To the extent that any of the District Court's findings of fact overruled those facts which had necessarily been determined by the Arbitrator, the District Court erred under the authority set forth in Point I, supra. Such treatment of the Award also squarely conflicts with Judge Edelstein's earlier decision in the Garment Workers case, supra, where he stated simply and definitely:

"[D]efendant [the party seeking to vacate the award] attempts to relitigate the facts as found by the arbitrator. This it may not do.

* * *

"To the extent that defendant's position necessitates a review of the facts, it is without merit." 43 Lab. Cas. ¶17, 126 at 25, 123, 25, 124.

Furthermore, to the extent that the District Court examined conflicting affidavits or other material and found new facts, it

has proceeded in a manner at variance with the holding of this Court in Orion Shipping and Trading Co. v. Eastern States Petroleum Corp., 312 F. 2d 299 (2d Cir. 1963) cert. denied 373 U.S. 949 (1963).

The restrictions on fact-finding by the District Courts when reviewing an arbitrator's award can be fairly well surmised from this Court's opinion in Orion, where this Court stated:

"The usual office of the confirmation action under 9 U.S.C. §9 is simply to determine whether the arbitrator's award falls within the four corners of the dispute as submitted to him. This action is one where the judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego'." 312 F. 2d at 301.

Unfortunately, the District Court engaged in exactly the process of fact finding disapproved by this Court in Orion, and thus did "unduly complicate and protract the proceeding" before it*

However, the most serious error of the District Court is not its failure to heed the admonition of Orion. The real vice of the District Court decision was its flagrant disregard of well-established substantive doctrines of law designed to promote important congressional policy in the fields of arbitration and labor law, as demonstrated in POINTS I, III and IV of this Memorandum of Law.

* Perhaps this contributed to inordinate amount of time it took the District Court to render its decision -- a period of almost three years.

III

THE BOTANY AGREEMENT IS WITHIN THE
SCOPE OF THE GARMENT INDUSTRY'S EX-
EMPTION TO SECTION 8(e) OF THE NLRA

A. Botany was a "jobber" or "contractor" actively participating in the integrated process of producing BOTANY Junior Clothing.

Botany's responsibilities and functions under its License Agreement with Levinsohn with respect to affixation and inspection of the Trademark, the quality and design of Levinsohn's Botany production and verification of the high standards of sale of BOTANY Junior Clothing, requiring the work of at least some Botany employees, are certainly as much a part of the integrated process by which Levinsohn produced salable BOTANY Junior Clothing as are the various other parts of this production process, such as cutting fabric or sewing buttons.

Moreover, once Botany acquired ownership of Levinsohn, Botany controlled all major decision-making affecting the manufacture by Levinsohn of BOTANY Junior Clothing, much in the same manner as any jobber in the Garment Industry initiates and controls the production process of the clothing he desires to have produced. Indeed, in the license Botany granted to Levinsohn and in the Botany Agreement itself, Botany had no hesitation in

describing itself as a "manufacturer", "engaged in the manufacture and sale...of apparel advertised and sold under the name and trademark, 'Botany'". Since Botany is, therefore, functionally a "contractor" and/or "jobber" in relation to the other parts of the integrated process by which BOTANY Junior Clothes are produced, Botany comes fully within the scope of the Garment Workers' Exemption:

Cf. Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, I.L.G.W.U., 494 F. 2d 1230 (2d Cir. 1974)

As this Court made clear in Danielson supra, a "jobber" in the garment industry need not have any employees engaged in direct manufacture, and need not have direct dealings with the manufacturing employees, Danielson supra at 1231, 1234.

The validity of the Botany Agreement therefore remains unimpaired by Section 8(e), even accepting, arguendo, the District Court's strained construction of the Garment Industry's Exemption to Section 8(e) and its right to review this issue.

Yet, this Court is not limited, any more than was the Arbitrator, to giving the Exemption such a strained construction which, as indicated infra, is entirely inconsistent with the Congressional history of the exemption. Furthermore, whatever may be said of Botany's role in the integrated production process prior to the acquisition of Levinsohn, common sense dictates that the integrated process by which BOTANY Junior Clothing was manufactured prior to

Botany's acquisition of Levinsohn had to change as a result of such acquisition. Prior to the acquisition, Levinsohn was the only "jobber" for the Junior Clothing it produced making all decisions as to production. Subsequent to the acquisition (irrespective of whether Botany satisfies the NLRB "Single Employee" doctrine), at least some, if not a good number of Levinsohn's major functions as a jobber, especially those involving major decision making, had to be assumed by Botany. To do otherwise would render the Botany officers in violation of their fiduciary obligations to the Botany stockholders. Thus, two of Botany's key officers sat on Levinsohn's Board of Directors and were given the key positions of President and Vice-President of Levinsohn. To argue that Botany regarded Levinsohn as a coupon-clipping investment with no degree of operational control is to completely ignore the competitive nature of the garment industry, where adequate control and supervision by the owner is essential for survival.

The District Court's view was that unless Botany could be identified with Levinsohn as an active participant in the integrated process of production under the N.L.R.B. Single Employer doctrine, Botany was not within the integrated process and could therefore not avail itself of the protection of Section 8(e). We submit that the District Court's view is not justified by either the cases or the Congressional History

The case of Bowater Steamship Company v. Patterson

303 F.2d 369 (2d Cir. 1962) cert. denied 371 U.S. 860., indicates that the District Court erred in finding the separate corporate status of Botany and its subsidiary, Levinsohn as the critical element in determining exemption. In Bowater, this Court held that where there is a potential conflict between national labor policy and the principles of contract or corporate law, national labor policy supersedes such legal principles. In that case, plaintiff sought to rely on general principles of contract and corporation law to circumvent the policy of §4 of the Norris-LaGuardia Act, 29 U.S.C.A. §104, that Federal Courts may not intervene in particular types of labor disputes, and (just as Botany does here) plaintiff placed primary reliance on the separate corporate identity of the parent company and the various subsidiaries thereof.

This Court in rejecting such formalistic reasoning, stated:

"Assuming, as we may, that plaintiff and Bowater's Newfoundland had sufficient independence to be regarded, in contract or tort litigation, as separate both from the ultimate parent...and from each other..., it does not follow that they ought to be so regarded for application of the Norris-La Guardia Act. Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked, or answered, in

vacuo...; the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law...As the Supreme Court has repeatedly taught, the policy behind the Norris La Guardia Act was a strong one; we cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a conglomeration of corporate entities, however much these might properly be respected for other purposes." 303 F. 2d at 372-373 (citation omitted; Emphasis Supplied)

Similarly, in UAW v. Eltra Corp., 61 LRRM 2699 (E.D. Mich. 1967), a Federal District Court held that "for labor relations purposes", a subsidiary must be considered the alter ego of its parent corporation despite its independent status for other purposes. In that case the Union sued for a declaratory judgment that a collective bargaining agreement signed by the parent applied to a subsidiary which had not signed the agreement. The court reviewed the real relationship between the parent and the subsidiary and the purpose of the agreement, and as a result, determined that the subsidiary was bound by the agreement, although it had not signed the same.

Again, in McLaughlin v. L. Bloom Sons Co., 51 LRRM 2111 (Dist. Ct. of App., Cal., 1st Dist. 1962) a California appellate Court in an action brought under Section 301 (a) of the LMRA, held that Federal law required the separate

identity of a subsidiary corporation should be disregarded for the purpose of determining whether it was bound by a collective bargaining agreement signed only by the parent, because under the circumstances the subsidiary has to be considered as the alter ego of the parent. The California court reached this conclusion, as a matter of equity, after a review of the true relationship between the parent and the subsidiary, and the purpose of the agreement.

Thus, if in order to apply the Garment Industry's Exemption to the Botany Agreement, we must under the District Court's criteria be able to say that Botany was the alter ego of Levinsohn and vice versa, there is sufficient authority in the cases to support such a proposition. Such a requirement, however, is merely a formal requirement which does not go to the heart of the matter.

It must be remembered that the Bowater, UAW and McLaughlin decisions each stem from the desire of a judge to do equity and implement the objectives of Congress or a valid agreement, irrespective of the formal legal distinctions between the respective parties.

For the very same reasons, the Botany Agreement is entitled to exemption from §8(e), irrespective of its form because its essential character, purpose and the manner in which it is designed to operate place it within the category of agreements Congress exempted from §8(e), and there is no legal impediment to such exemption in either the statute or the cases.

B. The Congressional history does not support the District Court's interpretation of the Garment Industry's Exemption.

The Congressional history of the Garment Industry's Exemption to Section 8(e)* evidences a clear legislative intent that the exemption be interpreted so as to preserve in toto the variety of agreements used in the Garment Industry in the elimination of its sweatshops and for the purpose of raising its labor standards and profits.

The original draft of Section 8(e) did not contain the Garment Industry's Exemption, and in reaction to this deficiency, many Senators and Congressmen devoted extensive time to explaining the need for such an exemption. Thus, Senator Kennedy stated:

"The point I make is that in the way the Senator's amendment is drafted, it would prevent, in the garment industry which has been an extremely competitive industry and in which the union has worked for the past 50 years to try to raise standards of those working in the industry - a union representative from going to an employer and asking the employer, as a part of the good will between the union and the employer, to subcontract his work to those employers who were paying a reasonable wage and not to give his work to employers who were paying sub-standard wages.

"That is the way the garment industry has been able to raise the economic standard of the workers engaged in it. That was the original sweatshop industry in this country.

"If the strike is against a sweatshop industry, I think the Senator from Arkansas can see how far reaching his amendment would be. I believe it is in the public interest for employers and unions to agree not to do business with employers who pay sub-standard wages and maintain sub-standard

*See Footnote to p. 19, *supra*.

working conditions. I believe it is proper for a union to say to employer B, 'Please do not subcontract any work to subcontractors who maintain sweatshop conditions.' II Leg. Hist. at 1195

Senator Javits addressed the problem as follows:

"Mr. President, it is readily felt that elimination of sweatshops in these two industries is heavily attributable to this method of proceeding to unionization through the fact that there is an integrated production process. I ask that the editorials to which I have referred may be made a part of my remarks.* II Leg. Hist. 1384, 1385.

Similarly, Representatives Thompson of New Jersey and Udall of Arizona submitted the following comments to the House:

"(2) Section 205 of the Landrum bill would invalidate the sub-contracting clauses which have proved essential to stabilizing the garment industry."

* The editorial referred to by Senator Javits was ordered to be printed in the record as follows:

A LABOR BILL PROBLEM

"Of all the complicated controversial issues raised by the House and Senate labor bills, on which the Conference Committee has asked instructions from the Senate, one is really not controversial nor is it especially complex. It ought to be quickly settled. We refer to Subdivision 8(a) of Section 705(a) of the Landrum-Griffin bill which prohibits the making of any collective agreement with an employer 'whereby such employer...agrees to cease doing business with any other person.'

"A narrow court interpretation of this language might wreck the whole structure of labor-management

(Footnote continued on following page)

"The garment industry is located in cities where it is easy to rent loft space. Garments are marketed by jobbers. Sewing machines and other machinery are easily moved from one loft to another. For years, employees suffered from low wages and miserable working conditions because a jobber who signed a union contract fixing a decent minimum wage could easily contract out the cutting and sewing to a sweatshop hidden away where the union had not found it. By the time the union caught up with the owner, the work would be done; and the jobber would give the next lot to another sweatshop.

"Both fairminded employers and the union representing the employees in the garment industry learned by hard experience that the only way to check this practice was for the union to induce jobbers to agree not to do business with subcontractors who had not signed contracts with the union.

"The Landrum bill would make it lawful for the International Ladies' Garment Workers to put pressure upon employers to continue this well-established and essential practice. The Landrum bill makes it unlawful for a union 'to threaten, coerce, or restrain any person engaged in commerce *** where *** an object thereof is *** forcing or requiring any person *** to agree to cease *** doing business with any other person.'

*Footnote from previous page continued

relations in the garment and clothing industries built up over the years and now become traditional. It has largely done away with sweatshop conditions in these trades and has established relative high wage and working standards which neither the leading employers nor the workers want to have broken down.

* * *

"This situation is a good illustration of the urgent need for care in drafting this legislation so as to avoid interference with already established and legitimate labor union practices."

II Leg. Hist. 1384, 1385.

"If the addition of the words 'agree to cease' has any meaning, they would prevent the union from pressing a jobber to agree to cease doing business with a non-union sweatshop. Thus, the Landrum bill threatens to disrupt the labor relations of the entire garment industry." II Leg. Hist. 1575, 1576."

Even Senator Goldwater, on whose remarks the District Court relies for its definition of the Garment Industry's Exemption, spoke expansively of the need for not upsetting the "status quo" in the garment industry by the proposed "hot cargo" legislation:

"We conferees are in a very peculiar position of everyone of us agreeing that we do not intend to upset the status quo of the garment or apparel industries. I am one who is probably closer to this situation than anyone except my friend from New York [Mr. Javits]. I have been engaged in the retail end of this business all my life. I have watched what has happened in the garment section of New York, the garment section of Philadelphia and St. Louis and Chicago and on the west coast, and I have seen sweatshops disappear. I have seen order come out of chaos. I have seen unions create profits for businesses which are unable to produce profits, and, Mr. President, none of us wants to disturb for one second the status the garment trade now occupies under the present law." II Leg. Hist. 1384, 1385*.

*There was extensive additional discussion in Congress in favor of the Garment Industry's Exemption by the above mentioned Senators and Representatives as well as by Representative Halperin. II Leg. Hist. 1377; 1384; 1708; 1736, 1737.

Despite the evident intent of Congress, as demonstrated by the above quoted remarks, to enable the unions and reputable companies in the garment industry to enter into agreements designed to prohibit sweatshops and subcontracting at unfair labor standards; despite the repeated remarks of the Senators and Representatives that §8(e) must not disturb the status quo on these matters as they had developed in the Garment Industry, the District Court chose to interpret an extension of the remarks of one Senator, Senator Goldwater (who was only one of the conferees who drafted the Garment Industry's Exemption) as setting forth an Internal Revenue Code-type definition of the conditions under which the Garment Industry Exemption could be invoked under Section 8(e). The conditions provided in that extension of Senator Goldwater's remarks, II Leg. Hist. 1857 and quoted in part by the District Court, 375 F. Supp. at 995, were obviously inserted by Senator Goldwater in the appendix to the Congressional Record to illustrate a typical application of the exemption, and not for the purpose of providing the only form of the "status quo" agreement used in the Garment Industry. Neither Senator Goldwater's remarks, when read in context, nor those of his colleagues supporting the Garment Industry's Exemption, were intended to limit such exemption to one standard form of

agreement. Rather, both the Statute and the Congressional history indicate a clear intent to legitimize those types of agreements between parties in the integrated clothing industry which were designed to prohibit subcontracting and other methods by which garment employers in the past had sought to lower labor standards, with the objective and operation, rather than the form being determinative of the agreement's right to the exemption.

What the District Court has done is convert Senator Goldwater's illustration into a narrow definition precluding the application the Garment Industry's exemption to any number of agreements connected with the integrated process of producing clothing, differing in form from that mandated by the District Court in this case, but having as their purpose and effect the very objectives Congress sought to achieve in enacting the Section 8(e) Exemption.

C. The text of the Garment Industry's Exemption does not support the qualifications for such exemption promulgated by the District Court, qualifications which are inconsistent with the construction given Section 8(e) by the Supreme Court in the National Woodwork case.

The second proviso under Section 8(e) itself contains no language which compels the use of the District Court's

required form of agreement as the only type of agreement which can satisfy the conditions of the Garment Industry's Exemption.

The second proviso to Section 8(e) merely states:

"Provided further, that for the purposes of this subsection (e) and section (b) (4) (B) of this section the terms 'any employer', any person engaged in commerce or in an industry affecting commerce; and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or sub-contractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, that nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception".

The words "jobber, manufacturer, contractor or sub-contractor working on the goods or premises of the jobber or manufacturer or performing parts of the integrated process of production in the apparel and clothing industry" are indeed not defined in Section 8(e), probably for the very reason that Congress desired that this critical exemption be freely interpreted to cover agreements made by any parties related to the production process as long as such agreements served to eliminate subcontracting, to avoid sweatshops and to prevent the deterioration of labor standards in the manner described by the many Senators and Congressmen who strenuously supported the exemption.

Furthermore, in the leading United States Supreme

Court case construing Section 8(e), the Court made a point of noting that Section 8(e) (of which the Garment Industry's Exemption constitutes the second proviso) is to be construed in accordance with its "spirit", and "intention of its makers", both of which may be inconsistent with a strictly literal interpretation of the statute. National Woodwork Manufacturers Association v. N.L.R.B., supra at 619, citing Holy Trinity Church v. U.S., 143 U.S. 457, 459 (1892).

There can be no doubt that the Botany Agreement in "spirit", objective and operation is the very type of agreement intended by Congress to qualify for the Garment Industry's Exemption. To hold otherwise is to exalt the form of Botany's and Levinsohn's corporate structure over the substance of their relationship and thus do violence to the principles of statutory construction for Section 8(e) laid down by the United States Supreme Court in National Woodwork, supra. In substance, the Botany Agreement is but a guarantee by Botany, the corporation controlling Levinsohn, the contractor employing 400 Union employees, that Botany will make certain that this contractor cannot and will not violate or evade the subcontracting and runaway shop prohibitions contained in the Collective Bargaining Agreement between the contractor and the Union. This guarantee differs little from the Agreements unions have traditionally obtained from "jobbers", in order to avoid sub-contracting to non-union

shops, agreements clearly within the Garment Industry's Exemption. For it is the jobbers who control the selection of the contractors and sub-contractors who do the work. As we have demonstrated above, Botany functions essentially as the "jobber" of the Botany Junior Clothing operations. The courts thus have no more reason under the text of the statute or the Congressional History to give the Botany Agreement anything less than the full immunity from the Garment Industry's Exemption than they give the typical jobber agreement in the Garment Industry.

The decision of the District Court, if left standing, represents a subversion of Congress' policy to freely authorize and encourage the Garment Industry to continue to make the type of agreements containing restrictions against employers Congress regarded as critically important to preserve both fair labor standards and fair profits for reputable employers in the Garment Industry.

POINT IV

THE BOTANY AGREEMENT IS EXEMPT FROM THE PROHIBITIONS OF SECTION 8(e) AS A WORK-PRESERVATION AGREEMENT UNDER THE NATIONAL WOODWORK DECISION

In National Woodwork, supra, the Supreme Court was not concerned with the form or mode of the prospective agreement sought by the union employees. The Supreme Court in National

Woodwork held Section 8(e) inapplicable simply because the construction employees there involved had sought to preserve for themselves work they had traditionally performed, by securing the agreement of the contractor to reject the use of prefabricated doors, thereby retaining for such employees their traditional task of finishing the doors on the construction site.

In the District Court, the Union argued that the Botany Agreement fell within the protection of the National Woodwork Doctrine because the ultimate purpose of the Botany Agreement was to preserve for the Levinsohn employees the work which they had traditionally done on BOTANY Junior Clothing. The District Court rejected this contention, stating that:

"Botany is not part of this integrated process [of production of Junior Clothing]; nor is it involved in the labor relations of the integrated process. Therefore, the Agreement is not to preserve the work of the employer's own employees."

"Furthermore, notwithstanding the Union's contention that its objective was to prevent Levinsohn from moving...and is thus work-preservative, the language of the Agreement belies this contention and clearly indicates that the Agreement was 'tactically calculated to satisfy union objectives elsewhere'". (375 F.Supp., at 498-499)

The District Court's conclusion that the Botany Agreement is not a work-preservative agreement within the meaning of National Woodwork blindly ignores the fact

that the Botany Agreement operated to guarantee the continuation of the work the Levinsohn employees had traditionally done in producing BOTANY clothes. The Botany Agreement constituted legally effective assurance that Botany would not cause Levinsohn to violate or evade the anti-subcontracting and runaway shop clauses of the Levinsohn Collective Bargaining Agreement (see pp 13-15 *supra*). This assured the Levinsohn employees that their traditional work would not be taken away by non-Union contractors.

The Supreme Court made it quite clear in National Woodwork that any agreement which had the substantive effect of a "shield to preserve the [union] members' jobs", 386 U.S. at 629 is valid under Section 8(e), and eschewed any literal reading of Section 8(e).

The fact that the only purpose of the Botany Agreement was to safeguard the jobs of the Levinsohn Union members is easily discerned from the manner in which the Botany Agreement was designed to operate (see pp 13-15) *supra*). Such purpose is also fully corroborated by: (i) Mr. Hollander's uncontradicted statements and his conversation with Mr. Daroff (95a, 97a-98a); (ii) the content of the *Whereas* clauses of the Botany Agreement (see pp. 13-15, supra); and (iii) the

lack of any other plausible reason for the Chairman of Botany's Board to have signed this agreement with the Union.

Finally, despite the District Court's categorical statement to the contrary, the fact that Botany, rather than Levinsohn, was the contracting party which protected the employees of its subsidiary, Levinsohn, by in effect, guaranteeing it would not circumvent the Collective Bargaining Agreement of its subsidiary, cannot disqualify an Agreement which did in fact preserve the traditional work of Levinsohn Union employees -- for purposes of an exemption that derives from a Supreme Court decision, National Woodwork, which is concerned with substance, spirit, and intent, and not form, or even the literal language of the statute or agreement. In substance, spirit, and intent the Botany Agreement is a work-preservation agreement falling squarely within the scope of the exemption to Section 8(e) afforded by the National Woodwork decision.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed.

If, notwithstanding the numerous errors of the District Court set forth above, this Court does not choose to strike down the holding of the District Court, we respectfully submit that due process and the need to avoid, in effect,

a trial of the merits soley on affidavits, requires at the least, that this Court reverse the District Court and remand this proceeding for a full evidentiary hearing on those material issues of fact in dispute before the District Court and on which the District Court based its decision.

Respectfully submitted,

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Of Counsel

~~UNITED STATES COURT OF APPEALS SECOND CIRCUIT~~ Index No.

MAX ROBB

Plaintiff-Appellee,

against

NEW YORK JOINT BOARD, AMALGAMATED

Defendant-Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.:

I, James Steele,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 30th day of August 1974 at 767 5th Ave., New York

deponent served the annexed *Brief for Def. App't* upon

Weil Gotshal & Manges

in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s)

Sworn to before me, this 30th
day of August 1974

Print name beneath signature

JAMES STEELE

ROBERT T. BRIN

NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418350
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975*Robert T. Brin*